

OCT 8 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

**No. 77-338**

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Petitioners,*

vs.

LIBERTY MUTUAL INSURANCE COMPANY,  
A CORPORATION,

*Respondent.*

**MEMORANDUM ON BEHALF OF LIBERTY MUTUAL  
INSURANCE COMPANY IN OPPOSITION TO  
TO PETITION FOR CERTIORARI**

KALVIN M. GROVE  
RONALD S. SHELDON  
LEDERER, FOX AND GROVE  
233 South Wacker Drive  
Chicago, Illinois 60606

ROBERT A. PENNEY  
175 Berkeley Street  
Boston, Massachusetts 02226

CLEM R. KYLE  
4150 U. S. Steel Building  
Pittsburgh, Pennsylvania 15219  
*Attorneys for Liberty Mutual  
Insurance Company*

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Respondent Liberty Mutual Insurance Company ("Liberty") respectfully prays that this Court deny Petitioners' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 1, 1977.

**REASONS WHY THE WRIT SHOULD  
NOT BE GRANTED**

Petitioners predicate their petition on two premises: *first*, that in considering the legality of a disability income plan, that plan cannot be severed from other purportedly discriminatory employment practices of the Employer; and *second*, that Petitioners never had an opportunity to demonstrate whether,

in fact, Liberty's disability income plan had an adverse effect on female employees.

1. The Court of Appeals found that Liberty's "income protection plan is clearly severable from the hiring and promotion practices" of Liberty. Pet. App. at 3a. The Court of Appeals noted that, in enjoining Liberty from using an income protection plan which "treated" pregnancy related disabilities differently from other disabilities, the District Court "demonstrate[d] no difficulty in separating the disability plan from other issues in the litigation." *Ibid.* Accordingly, since "[t]he plan under consideration [in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976)] is indistinguishable in any relevant provision from that offered by Liberty Mutual",<sup>1</sup> the court below concluded that "*Gilbert* requires that we . . . enter judgment for the defendant on the disability income issue." *Ibid.* Neither of these *factual* conclusions are or could be controverted by the Petitioner. The Court of Appeals' application of the law to these facts not only conformed to this Court's holding in *Gilbert*, but also with the current position of the Equal Employment Opportunity Commission.<sup>2</sup>

2. Petitioners heretofore have treated the question of the lawfulness of Liberty's disability income plan as "ripe for summary judgment" since the inception of this lawsuit,<sup>3</sup> and have

1. *Gilbert* and this case were argued together before this Court in the October, 1975 term, but this case was thereafter remanded to the Court of Appeals with instructions to dismiss the appeal for want of an appealable order. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U. S. 737 (1976). *Gilbert* was then reargued in the following term. After remand but prior to *Gilbert*, the District Court issued an appealable order enjoining enforcement of Liberty's plan which, in turn, was vacated by the court below after *Gilbert* and is now the subject of the instant petition.

2. Subsequent to *Gilbert*, the Commission now automatically issues a no-cause finding with respect to charges raising *Gilbert*, Liberty-type disability income plan issues, treating such issues as severable from all others. See Addendum to Brief in Opposition, attached hereto.

3. Brief for Appellees, *Wetzel v. Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3rd Cir. 1975), at p. 3. The District Court also

(Footnote continued on next page.)

never attempted to proffer evidence as to the alleged adverse effect of Liberty's plan upon females, although they have always had the opportunity to do so. The time for presentation of such evidence, if it existed, has thus long since passed. The instant case, accordingly, is in the same posture as *Gilbert*, where this Court noted the same lack of proof. 97 S. Ct. at 406, and n. 11 at 406. This factor, however, did not prevent this Court from deciding, as it did, that General Electric's "disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities." *Id.* at 413. The instant case, as the court below concluded, should be treated no differently.

The United States Court of Appeals for the Third Circuit correctly held that this Court's decision in *General Electric Co. v. Gilbert*, *supra*, is "dispositive of the issues raised in the case *sub judice*."<sup>4</sup> The petition for writ of *certiorari* should be denied.

Respectfully submitted,

KALVIN M. GROVE  
RONALD S. SHELDON  
LEDERER, FOX and GROVE  
233 South Wacker Drive  
Chicago, Illinois 60606

ROBERT A. PENNEY  
175 Berkeley Street  
Boston, Massachusetts 02226

CLEM R. KYLE  
4150 U. S. Steel Building  
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(Footnote continued from preceding page.)

treated the case as proper for summary judgment (Pet. App. at 43a-44a) and found "no disputed issue of fact" (Pet. App. at 23a), a finding which Petitioners did not contest on appeal.

4. Pet. App. at 2a.

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**ADDENDUM**

**NOTICE**

Number 915

Date 12/30/76

(Automatically Canceled in Ninety Days)

1. **SUBJECT. PROCEDURES FOR PROCESSING PREGNANCY RELATED ALLEGATIONS OF SEX DISCRIMINATION**
2. **PURPOSE.** This notice establishes the procedure for processing charges of sex discrimination in light of *General Electric Co. v. Gilbert*, 45 U. S. L. W. 4031 (December 7, 1976).
3. **ORIGINATOR.** Office of Compliance Programs.
4. **EFFECTIVE DATE.** January 3, 1977.
5. **RESPONSIBILITIES AND PROCEDURES.** In order to implement the United States Supreme Court's decision in *General Electric Co. v. Gilbert*, 45 U. S. L. W. 4031 (December 7, 1976), the Commission directs that the following procedures be followed in processing charges which allege *discrimination because pregnancy or maternity claims are treated differently by a respondent from other claims under temporary disability or health benefit programs* (hereinafter referred to as "*Gilbert* allegations"):
  - a. **New Charges**—Persons who make *Gilbert* allegations shall be counselled that no relief is available under Title VII. If such individuals exercise their rights to file charges which raise only *Gilbert* issues "no reasonable cause" Letters of Determination shall be issued immediately after the charges are formally filed. (See attached suggested LOD language)



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All charges containing *Gilbert* allegations and other allegations of discrimination will be processed routinely as to the other issues. Except where Charging Party indicates in writing a desire that the *Gilbert* allegations not be pursued, the Letter of Determination will address the *Gilbert* issue and find no reasonable cause.

- b. *Charges Pending Letters of Determination*—All *Gilbert* allegations in open charges shall be resolved by finding that there is not reasonable cause to believe that Title VII has been violated. (See attached)
- c. *Charges Pending Conciliation Efforts*—"Reasonable cause" determinations on charges containing *Gilbert* allegations, which are being conciliated or are pending conciliation, shall be reconsidered and amendments to existing Letters of Determination shall be issued finding no reasonable cause exists as to the *Gilbert* allegations. Where reasonable cause had been found on *Gilbert* allegations and other issues, conciliation efforts shall not proceed prior to the issuance of an amendment to the existing Letter of Determination. (See attached.)
- d. *Charges Pending Litigation Review*—No action shall be taken by District Offices with respect to charges containing *Gilbert* allegations which are being processed by the Office of the General Counsel or the Department of Justice unless such charges are returned to the District Office. If such charges are returned, an amendment to the existing Letters of Determination shall be issued finding no reasonable cause as to the *Gilbert* allegations. Where such charges contain non-*Gilbert* allegations on which reasonable cause has been found, the District Office must offer respondents a new opportunity to conciliate these issues in accordance with 29 C. F. R. § 1601.22 and § 1601.23.
- e. *Closed Charges*—Where the Commission has terminated its processing of a charge containing *Gilbert* allegations

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and has issued a notice of Right-to-Sue to the aggrieved person or persons, no further action needs to be taken with respect to such a charge notwithstanding the determination that was made on the *Gilbert* allegation.

- f. *Conciliated Charges*—District Offices shall continue to monitor the performance of respondents under conciliation agreements which require that pregnancy or maternity claims be treated in the same manner as other claims under a temporary disability or health benefit program because *General Electric Co. v. Gilbert* does not make such agreements unlawful.
6. The Commission has determined that distinctive treatment of pregnancy or maternity in the following situations continues to be unlawful because these criteria have a disproportionate impact on women and are therefore gender based or are by their terms gender based:
- a. refusals to hire, train, assign or promote pregnant women
  - b. refusals to hire, train, assign or promote married women
  - c. refusals to hire, train, assign or promote women of child-bearing age
  - d. mandatory maternity leaves for predetermined time periods
  - e. dismissals of pregnant women
  - f. denials of reemployment rights to women on leave for pregnancy-related reasons
  - g. denials of unemployment benefits to pregnant women
  - h. denials of seniority or longevity credit to women on leave for pregnancy-related reasons
  - i. denials of accrued leave to pregnant women who have worked less than a stated time period
  - j. payment of lower periodic amounts to retired women according to sex-segregated actuarial tables

- k. denials of disability or medical benefits for disabilities which are unrelated to pregnancy or childbirth, whether or not they occur during a pregnancy, childbirth, or recovery from childbirth.
7. District Directors will, therefore, continue to make determinations on charges involving the above criteria in the circumstances permitted prior to the Supreme Court's decision, except for (k), above. If the criteria in (k) applies, District Offices must contact Decisions Division in the same manner as with other non-CDP cases.

**Attachments**

**Appendix A, WMS Procedures**

**Appendix B, CSRS Coding Instructions**

**Approved: /s/ EDUARDO PENA, JR.**

***Director, Office of Compliance Programs***

**[Attachments omitted]**